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COURT OF CRIMINAL APPEALS
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NO. PD-0771-17

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/27/2018
DEANA WILLIAMSON, CLERK

JOHN CHAMBERS, Petitioner

VS.

THE STATE OF TEXAS, Respondent

On appeal from Cause No. 2015-DCR-268-D from the 103rd Judicial District Court of Cameron County, Texas

Seeking review of the Thirteenth Court of Appeals' Judgment in Cause No. 13-16-00079-CR

PETITIONER'S BRIEF

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NO. PD-0771-17

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

Austin, Texas

JOHN CHAMBERS,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW John Chambers, Petitioner, and moves this Court to REVERSE the judgment and render an ACQUITTAL for Petitioner. Alternatively, Petitioner moves this Court to REVERSE the judgment and REMAND the case for further proceedings as requested herein. In support thereof respectfully shows this Honorable Court as follows:

STATEMENT OF THE CASE

John Chambers was charged with fourteen counts of tampering with governmental records with intent to defraud or harm, each a state jail felony. [CR at 5]. TEX. PENAL CODE ANN. §37.10(c)(1) (West, Westlaw through 2015 R.S.). Specifically, he was accused of submitting fourteen firearm qualifications forms indicating that each "reserve" police officer passed a firearms qualification practical pistol course on September 20, 2014, with a firearm registered to Chambers. Id.

Although the evidence showed that each reserve police officer had, in fact, passed the firearms qualification practical pistol course that calendar year, the calendar date and weapon serial number were not properly identified. [RR Vol 11 at 98, 105, 114, 126, 134, 137, 144, 148, 154, 161, 164, 173, 182]. After a jury found Chambers guilty of all fourteen counts, the trial court sentenced him to two years confinement in state jail, probated for five years, and a $200 fine for each count. [CR at 226]. The sentences are to run concurrently. *Id.*[1]

[1] One of the officers listed in the charge, Jose Luis Hernandez Jr. did not testify. Thus, the State did not provide any testimony from him as to the accuracy of the entries. Notwithstanding, Chambers was still found guilty of that count. [RR Vol 13 at 54].

STATEMENT OF PROCEDURAL HISTORY

After the trial court certified Chambers right to appeal [CR at 219], Chambers timely filed a notice of appeal in the Thirteenth Court of Appeals. [CR at 217]. In a published opinion, the court of appeals affirmed the trial court's judgment. [Appendix]. A motion for rehearing en banc was subsequently denied.

This Honorable Court granted petition for discretionary review. Chambers submits this brief to challenge the court of appeals' conclusions and holdings. A motion to extend the time for filing a brief was filed by Petitioner and granted by this Court. This brief is timely if filed by February 26, 2018.

GROUNDS FOR REVIEW

I. The Appellate Court Improperly Reviewed the Legal Sufficiency of the Evidence Against Chambers pursuant to § 37.10 of the Texas Penal Code when it Refused to Acknowledge that the Texas Commission on Law Enforcement was Acting in Contravention of its Legal Authority.

II. This Court Should Summarily Grant this Petition for Discretionary Review and Remand the Case to The Court of Appeals Because of That Court's Failure to Comply with Texas Rule of Appellate Procedure 47.1.

III. The Trial Court Abused its Discretion by Failing to Submit an Instruction to the Jury on the Applicable Law Regarding the Distinction Between an Employee and a Volunteer Reservist.

IV. The Difference Between the Class A Misdemeanor and the Felony Enhancement Pursuant to § 37.10 of the Texas Penal Code is a Distinction Without a Difference. In Addition, the Appellate Court's Reliance Upon an Improper Application of Law is Legally Insufficient to Uphold a Finding of an "intent to defraud."

STATEMENT OF FACTS

John Chambers was the chief of police for the Indian Lakes Police Department in Cameron County, Texas. [RR Vol 12 at 7]. He served as a licensed peace officer from 1994 until the time of his conviction [RR Vol 12 at 8]. Indian Lakes is a small town, with a population ranging between 600 to 800 residents, depending upon the time of year. [RR Vol 12 at 8-9]. The Indian Lakes PD consists of only one or sometimes two full-time employees (including the chief of police), with the bulk of the manpower coming from volunteer "reserve" police officers appointed by the chief. [RR Vol 12 at 9 – 10]. At that time, the only two individuals employed and working for the Indian Lakes PD was Chambers and Fred Avalos. [RR Vol 12 at 10].

In early 2015, the Texas Commission on Law Enforcement ("TCOLE") appeared and conducted an audit of the Indian Lakes PD to determine if the department's record keeping obligations were in order. [RR Vol 10 at 61]. The audit was conducted by TCOLE field agent Derry Minor, who is tasked with the duty of auditing law enforcement agencies for their hiring records and to assist department administrators in the process of hiring employees. [RR Vol 10 at 44]. After the audit, Agent Minor prepared a preliminary report indicating that eight reservist police officers did not have up-to-date firearms qualification records on file at the

Indian Lakes PD. [RR Vol 10 at 66]. Agent Minor gave Chambers seven business days to correct the deficiency. [RR Vol 10 at 68].

Agent Minor attested to his belief that the law requires a police department to acquire and maintain firearms qualification records for every officer *appointed* to that department. [RR Vol 10 at 85-86]. Without this qualification at the time of appointment, Minor contended, even an otherwise licensed peace officer would have no authority to carry a weapon. [RR Vol 10 at 85-86].

All of Agent Minor's testimony, however, presupposes that only licensed peace officers regulated by TCOLE can serve as a "reserve" police officer. When confronted with the statutory text of the Texas Local Government Code, which allows for a police chief to appoint a volunteer **irrespective** of his licensure and subject only to the regulations promulgated by the police department, Agent Minor could only state that this statute was in direct conflict with TCOLE policy. [RR Vol 10 at 93].

The evidence indisputably shows that Chambers, as the police chief, delegated the responsibility of correcting the firearms qualification deficiencies to his second-in-command, Fred Avalos. [RR Vol 11 at 32].[2] Avalos was uncomfortable with

[2] Chambers was running in a heated election for Sheriff of Cameron County. [RR Vol. 12 at 7]. Avalos stood to benefit from Chambers' ousting as Police Chief because, as the only other peace officer in the Indian Lakes PD, he would become the Police Chief by default. He actually did become the interim Police Chief for a short time. [RR Vol. 11 at 73].

Chamber's instructions because of his mistaken belief that the "firearms qualifications forms" that the Indian Lakes PD used were somehow promulgated by TCOLE, or that the forms were the only permissible method of keeping the information sought by TCOLE, and that he would somehow be violating the law if he modified them.[3] [RR Vol 11 at 72-3]. In reality, there is no statutorily prescribed manner for keeping firearms qualification information. [RR Vol 12 at 92]. Chambers would have been perfectly within his right to call each officer with missing information, write that information down on a legal pad, and fax it to TCOLE. *Id.*

Avalos then disregarded Chambers' instructions to find the qualifications records and prepare forms with the proper information. [RR Vol 11 at 63]. Instead, he went to TCOLE, where he demanded and obtained a verbal promise of criminal immunity. *Id*. He subsequently personally created each one of the documents at issue in this case, placing the identical incorrect information into each one, namely the incorrect date and weapon serial number. [RR Vol 11 at 32-33].

The evidence, however, showed that each and every one of the "reserve" police officers were, in fact, plainly qualified to use the type of weapon disclosed in the firearms qualification documents submitted to TCOLE, and that the other language was mere surplusage even according to the requirements of the Texas

[3] Since Avalos did not have a "blank form" to use, he used Chambers' form as a template for each of the reserve officers.

Administrative Code. [RR Vol 11 at 98, 105, 114, 126, 134, 137, 144, 148, 154, 161, 164, 173, 182].

The defense moved for directed verdict of acquittal at the close of the State's case-in-chief and at the close of evidence. Both motions were denied. [CR at 227]. The defense also sought the inclusion of language in the jury charge instructing the jury on the Texas Local Government Code, which by its plain *terms and meaning* obviates the need for firearms qualification record keeping for ***all volunteer reserve officers*** at a department like Indian Lakes PD. The trial court denied the instruction. [RR Vol 12 at 123].

ARGUMENT - REASONS FOR REVIEW

Preliminary Statement

Guidance is needed for certain municipal police departments whose power with respect to "reserve" police officers are seemingly being usurped by the Texas Commission on Law Enforcement in violation of existing law. The matters at issue herein would not exist had TCOLE not barged into a small municipal police department, scared its employees, and unlawfully sought to impose its will. In short, TCOLE has taken a position that every municipal police department must comply with its rules and regulations. However, that is not the law. Although the Texas Occupations Code generally lays out the scope of TCOLE's authority to regulate, it does not trump the Texas Local Government Code §341.012 that gives all municipalities the ***sole*** power to regulate their volunteer "reserve" police officers. The Court of Appeals published opinion on this issue exacerbates the problem.

I. The Appellate Court's Legal Sufficiency Analysis Was in Error

In reviewing the legal sufficiency claim, a court should review the evidence in a light most favorable to the verdict and determine if any rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex.Crim.App. 2013). The problem in this case has less to do with the factual determination of the evidence but more to do with the court's interpretation of the definition of a "government record" pursuant to § 37.01

of the Texas Penal Code. Such an interpretation is overly broad and ignores the impact of the statutory defense. Agreement as to facts does not necessarily support a conviction, the facts must be taken in their totality according to the law of the case. *DeLay v. State*, 443 S.W.3d 909, 912 (Tex.Crim.App. 2014) (requiring proper construction of penal provision charged).

A. Background

The infirmities of the lower court's opinion come from the same problem that spawned the criminal case against Chambers in the first place. It is a refusal to acknowledge that the Texas Commission on Law Enforcement was acting in contravention of its delegated authority and applicable laws. TCOLE wrongfully required Chambers to maintain firearms qualifications records for his reserve police force. At trial, this fact was not in dispute. An exchange between trial counsel and one of the agents for TCOLE, Derry Minor sums up the problem succinctly:

> Q: Are you aware of the provisions in [the Local Government Code] which state that a chief of police can appoint a person who is not a licensed peace officer to serve at his direction?
>
> A: And it directly conflicts with our Administrative Code.
>
> Q: I understand. So if you're looking at something that is statutorily set forth in the Local Government Code . . . in your mind, working for [TCOLE], the Administrative Code controls how do you advise the chief what you want the chief to do, et cetera?

A: Yeah, we're set by the legislature that we enforce the Occupations Code, 1701 of the Occupations Code, which then refers back to the Administrative Code. It does not mention the Local Government Code.

Q: Now, Mr. Minor, does not the Occupations Code also list within it the provisions of Sec. 341 of the Texas Local Government Code?

A: Yes it does.

Q: And that is the provision for a reserve police force?

A: Yes.

Q: So the legislature explicitly tells us to go look at that part of the law that allows for non-licensed peace officers, doesn't it?

A: Our Commission and our director has ruled to us, that's what they directed me . . . that they cannot appoint an unlicensed peace officer.

[RR Vol 10 at 93-94]. TCOLE does not recognize a police chief's authority to create a reserve police force that is not regulated by their agency. This is in direct contravention of the limits set out by the legislature in the creation of TCOLE. TEX. OCC. CODE § 1701.003(a)(1) (cannot limit municipality's power). Moreover, "an agency rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *R.R. Comm'n v. Arco Oil & Gas Co.*, 876 S.W.2d 473, 481 (Tex. App.—Austin 1994) (writ denied) (superseded by statute on other grounds).

To begin the inquiry, we must look to the Texas Occupations Code, which both delegates the authority to the Texas Commission on Law Enforcement and establishes exceptions to its authority. At the outset, the Occupations Code delineates between two classes of "officers":

> "Officer" means a peace officer *or* reserve law enforcement officer.
>
> "Peace officer" means a person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, or other law.

TEX. OCCUPATIONS CODE § 1701.001 (3); (4) (2015). This statute continues by defining a reserve law enforcement officer as "a person designated as a reserve law enforcement officer under Section 85.004, 86.012, or 341.012, Local Government Code, or Section 60.0775, Water Code." TEX. OCCUPATIONS CODE § 1701.001 (6) (2015). Simply by virtue of these definitions, we begin to understand that employed peace officers and volunteer reserves will be treated differently under the statutory scheme.

Consulting the Local Government Code, as the Occupations Code instructs, clearly establishes the legislature's intent to treat volunteer reservists differently from full-time, employed peace officers:

> (a) *The governing body of a municipality may provide for the establishment of a police reserve force.*
>
> *(b) The governing body shall establish qualifications and standards of training for members of the reserve force.*
>
> (c) The governing body may limit the size of the reserve force.
>
> (d) *The chief of police shall appoint the members of the reserve force. Members serve at the chief's discretion.*
>
> (e) The chief of police may call the reserve force into service at any time the chief considers it necessary to have additional officers to preserve the peace and enforce the law.

(f) *A member of a reserve force who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, may act as a peace officer only during the actual discharge of official duties.*

(g) *An appointment to the reserve force must be approved by the governing body before the person appointed may carry a weapon or otherwise act as a peace officer.* On approval of the appointment of a member who is not a peace officer as described by Article 2.12, Code of Criminal Procedure, *the person appointed may carry a weapon only when authorized to do so by the chief of police* and only when discharging official duties as a peace officer.

TEX. LOCAL GOV'T CODE § 341.012 (2015) (emphasis added). The TCOLE regulations require firearms qualification because that qualification fits hand-in-glove with the Commission's presupposition that all officers under its jurisdiction will be licensed peace officers.

The Local Government Code, in contrast, assumes a possibility in which a volunteer officer might not have his peace officer's license, but nevertheless allows him to carry a firearm in the line of duty. The regulations expect an officer to qualify with a firearm on a twelve-month schedule during the course of his *employment* with a police department; the Local Government Code, accounting for individuals who volunteer rather than obtain full-time employment, permits the municipal government and the chief of police to set their own qualifications for firearms proficiency. The TCOLE regulations exist to bring structure and consistency to the peace officers it licenses and regulates; the Local Government Code provides for a

chief of police to appoint reservists not under the supervision of TCOLE. Most importantly, the Local Government Code was promulgated by the Texas Legislature, whilst the TCOLE regulations were promulgated by unelected administrators of the executive branch.[4]

As far as Counsel can ascertain, this matter of statutory interpretation is a question of first impression in the State of Texas. Nevertheless, the bedrock principles of statutory construction favor Petitioner's interpretation of the statutes and regulations at issue in this case.

It is Petitioner's contention that the Local Government Code controls the department's record keeping obligations with respect to volunteer reserve officers. It is furthermore Petitioner's contention that the Texas Commission on Law Enforcement lacks the jurisdiction to impose independent record keeping requirements for reserve officers upon a municipality, and that this interpretation is pursuant to the plain meaning of the Local Government Code. Although an administrative agency's construction of a statute is entitled to some deference, that deference is only permitted where (1) the agency is tasked with enforcing the statute, and (2) the agency's construction is not in conflict with the plain meaning of the statute. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water,*

[4] Furthermore, the policy of TCOLE requiring firearms qualifications for reserve officers violates the separation of powers doctrine under Texas Constitution Article II § 1.

336 S.W.3d 619, 624-25 (Tex. 2011). In Texas, this doctrine is referred to as the "serious consideration" inquiry. *Id* at 625 (quoting *First Am. Title Ins. Co. v. Combs,* 258 S.W.3d 627, 632 (Tex. 2008)). The inquiry is not without its limitations:

> It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an unambiguous statute. ***But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing*** or opinions [in a court brief]. Second, ***the language at issue must be ambiguous***; an agency's opinion cannot change plain language. ***Third, the agency's construction must be reasonable***; alternative unreasonable constructions do not make a policy ambiguous.

Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-48 (Tex. 2006) (emphasis added).

In this case, the administrative interpretation put forward by the State's witness – agent Minor – does not trigger this Court's responsibility to conduct the "serious consideration inquiry" because the Texas Commission on Law Enforcement, by the plain meaning of Section 341.012 of the Texas Local Government Code, is not tasked with regulating the qualifications of volunteer reserve officers. By the plain meaning of Section 341.012, that responsibility falls squarely on the municipality and the chief of police.

Assuming, *arguendo,* that the "serious inquiry" test is applicable, the Agency's interpretation is not reasonable, nor can it meet the requirements set out in *Fiess, supra,* for due consideration. There is no formal opinion by the Texas Commission on Law Enforcement that reserve officers are subject to these specific

record keeping requirements. In fact, the few times that reserve officers are alluded to in TCOLE's administrative regulations specifically refer the reader back to the Section 1701.001 of the Texas Occupation's Code, which in turn refers the reader to the special rules governing volunteer reservists in Section 341.012 of the Local Government Code. *Cf.* 37 Tex. Admin. Code § 211.1 (44) (2015) ("Officer – a peace officer ***or*** reserve officer identified under the provisions of the Texas Occupations Code § 1701.001.") (emphasis added); 37 TEX. ADMIN CODE § 211.1 (55) (2015) ("Reserve – A person appointed as a reserve law enforcement officer under the provisions of the Texas Occupations Code § 1701.001"). While TCOLE does address reservists in other sections of its regulations, it is strangely silent on the subject of reservists in its continuing qualifications duties under Section 218.9, which plainly applies only to officers "employed" by an agency. 37 TEX. ADMIN CODE § 218.9 (2015). It is also silent as to reservists in its regulations concerning the "hiring" of officers by a department; this statute also contains firearms qualification record keeping requirements. 37 TEX. ADMIN. CODE § 217.7 (2015).

Additionally, the language of the statute is not ambiguous. TCOLE directs the reader to the Occupations Code, which in turn brings the reader to Section 341.012 of the Local Government Code. That provision plainly allows volunteer reservists to carry a weapon in the line of duty after appointment by the chief, subject to the regulations of the municipality, irrespective of whether or not that officer holds a

Peace Officer's License as would otherwise be required by the commission. By its plain meaning, the TCOLE regulations pertaining to the keeping of firearms qualification records do not apply because the chief and the municipality dictate the officer's qualifications, not TCOLE.

B. The Analysis of "Government Record"

The appellate court seems to find that because Chambers and Fred Avalos were police officers at the time Avalos created the documents in question, the inquiry ends. The documents are government records. Opinion at 6-7. The problem is that the court took no time to address the meaning of "for information of government" as used in § 37.01. It shirked the responsibility not to lead to absurd results in a plain meaning analysis. *Faulk v. State*, 608 S.W.2d 625, 630 (Tex.Crim.App. 1980). The statute must refer to records that have a legal reason or at the very least serve some purpose toward the duties of the government. *Id.*; TEX. PENAL CODE § 37.01; TEX. PENAL CODE § 37.10(f). Without this understanding, an individual could be charged under this statute for making false entries in matters as trivial as a holiday gift exchange list.

The case cited by the appellate court for the proposition that there is no need for a record to be required by law to be kept is distinguishable. Opinion at 6 (citing *Magee v. State*, No. 01-02-00578-CR, 2003 WL 22862644, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (mem. op., not designated for publication).

Magee, dealt with false entries in a police report which, although not specifically required by law, are part and parcel to the functioning of a police department—the duty to investigate crimes. *Id*. In this case, the situation is very different. The documents in question were required by TCOLE, not the City of Indian Lakes; this requirement was in direct conflict with existing law. *Cf*. TEX. OCC. CODE § 1701.003(a)(1); LOC. GOV'T CODE § 341.012(g); [RR. Vol. 12 at 97-98].

All powers of the government to act are ultimately granted by the people through their representatives in the form of law. TEX. CONST. Art. I § 2. Requiring the State to prove where the need to keep the information came from is both legally required and logical. It was not superfluous to the charged conduct. In fact, the State attempted to prove the source of the requirement and utterly failed. The provisions from which TCOLE derived its firearm qualifications requirements did not apply to volunteer reserve officers.[5] The record is undisputed. None of the individuals whose records were alleged to have false entries were **employed** by the city of Indian Lakes Police Department. They were members of the reserve police force. Even more unsettling is that the evidence showed that the need for the records by TCOLE was in direct and knowing opposition to the laws of this state [RR Vol. 12 at 97-8].

The law plainly does not contemplate TCOLE record keeping requirements for the firearms qualifications of volunteer reserve peace officers. Because these

[5] *See* 37 TEX. ADMIN CODE § 218.9 and 37 TEX. ADMIN. CODE § 217.7.

records were not required by law to be kept, nor were they kept for government purposes, they are not governmental records. *Cf. Pokladnik v. State,* 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.) (holding that because the record in question was not kept by government for informational purposes, the record was not a governmental record); *Constructors Unlimited, Inc. v. State,* 717 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1986, no writ) (contractor estimates were not governmental records when submitted). Although these cases attend to the provisions of the tampering with a governmental record statute applying to things "received by government," Petitioner submits that they apply with equal and if not, greater force to a record that was never required by law to be kept in the first instance. *See Siegel v. State*, No. 09-13-00536-CR, 2015 Tex. App. LEXIS 6372, at *8-9 (App.—Beaumont 2015, memorandum opinion) (disregarding attorney General Opinion stating Election Code required retention of residency information).

Without a governmental record, the State lacks any proof of the most essential element of a Section 37.10 prosecution – a governmental record. Because no governmental records exist in this case, no rational trier of fact could have found John Chambers guilty. *Jackson v. Virginia,* 443 U.S. 307 (1979). This Court should reverse Chambers' convictions on all fourteen counts and render a judgment of acquittal.

C. Legal Analysis of the Defense Contained in Texas Penal Code § 37.10(f).

Admittedly, the court of appeals did attempt to find a way to read § 37.10 in a manner that would not lead to altogether absurd results. It relied on the statutory defense provided in § 37.10(f) of the Texas Penal Code. The court reasoned that this "safety valve" would sufficiently narrow the broad definition of government record in § 37.01. Opinion at 8. The problem, however, is that the statutory defense refers only to the entries or falsified information and not the definition of a government record in itself.

Nonetheless, this interpretation still favors a finding of legal insufficiency and hardly undercuts Chambers' arguments at trial and on appeal. [CR at 176]; App. Reply Br. at 4-6. It logically follows that a record which was required in contravention of the laws of the State of Texas could have no entries or information that served a government purpose within it.

At trial, it was necessary for the state to disprove the statutory defense that "the false entry or false information could have no effect on the government's purpose for having the governmental record." TEX. PENAL CODE § 37.10(f). If there is a reasonable doubt with respect to this defense, the accused must be acquitted under TEX. PENAL CODE § 2.03(d). *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex.Crim.App. 2003). The defense was stated in the jury charge [CR at 176]. The State could show utterly no meaningful reason that Chambers was required to keep

the information. Without a legal reason to maintain the information, why would any entry matter? No rational trier of fact could have found Chambers guilty. *Jackson v. Virginia*, 443 U.S. 307 (1979).

D. Legal Impossibility

The facts of this case present a legal impossibility. A legal impossibility exists where what the actor intends to do would not constitute a crime. *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex.Crim.App. 1995). This is a defense to prosecution that is still recognized by this Court. *Chen v. State*, 42 S.W.3d 926, 929 (Tex.Crim.App. 2001). In this case, it was impossible for Chambers to violate the law whether he completed the act or not. Even if he intended to make false entries in the firearms qualifications with the intent to defraud TCOLE into believing the information contained in the documents was correct, it was impossible for the actions to constitute a crime. As discussed above, the documents were completely meaningless and required by TCOLE in contravention of their statutorily authorized authority.

The lower court improperly reviewed Chambers' legal sufficiency challenge to his convictions. The broad-brush strokes with which the court sweeps this case under the rug creates a myriad of ambiguities in the application of § 37.10 of the Texas Penal Code and the authority of TCOLE. It further ignores the legal impossibility of Chambers' actions. *Id.* This court should reverse the convictions and order the lower court to enter an acquittal.

II. Failure To Comply With Texas Rule of Appellate Procedure 47.1

The court of appeals failed to fully consider and address Chambers' arguments regarding the defense embodied within Section 37.10(f). Chambers argued in his opening brief that "[b]ecause these records were not required by law to be kept, **nor were they kept for government purposes**, they are not governmental records. *Cf. Pokadnik v. State*, 876 S.W. 2d 525, 527 (Tex. App.–Dallas 1994, no pet.) (holding that because the record in question was not kept by government for informational purposes, the record was not a governmental record)." App.Br. at 15 (emphasis added).

In its brief, the State responded that it was unnecessary to prove that the government record had any purpose in the law. St. Br. at 8. Chambers replied to the State's argument, pointing out that it ignored the statutory defense embodied within Section 37.10(f) to the effect that "the false entry or false information could have no effect on the government's purpose for having the government record." App. Reply Br. at 4-6.

In its opinion, the court of appeals noted that "[t]he jury charge contained an instruction as to the section 37.10(f) defense," and concluded that it did not have to fully address Chambers' arguments because he "does not argue on appeal that the evidence was insufficient to support the jury's implicit rejection of that defense." Opinion at 8, n. 4. But in an apparent contradiction, the court further observed that

the section 37.10(f) defense "serves as a safety valve that would generally prevent conviction in cases where the record at issue, though `kept' by a government entity `for information,' is insignificant or otherwise unrelated to the entity's government function." Opinion at 8.

Chambers' argument regarding the impact of the section 37.10(f) defense was an integral component of his first issue on appeal: that the evidence was legally insufficient, in part, because the documentation reflecting the firearms qualifications of the fourteen reserve officers were not "government records" for purposes of the tampering statute. By failing to directly address Chambers' argument, the court of appeals failed to comply with Tex. R. App. P. 47.1, which provides, in relevant part, that the "Court of Appeals must hand down a written opinion ... *that addresses every issue raised and necessary to final disposition of the appeal* ...." (Emphasis added). Indeed, in *Light v. State*, 15 S.W.3d 104, 105 (Tex.Crim.App. 2000), this Court stated:

> The courts of appeals are required to review every argument raised by a party that is necessary to the disposition of that appeal. *See Tex. R. App. Proc. 47.1(a)*; *Davis v. State*, 817 S.W.2d 345, 346 (Tex. Cr. App. 1991) (holding that the courts of appeals should not dismiss a point of error when it is properly briefed by a party). Failure by a court of appeals to address a point of error properly raised by a party requires remand for consideration of that point of error. *See Davis*, 817 S.W.2d at 346 (remanding a neglected point of error to the court of appeals for consideration); cf. *Weatherford v. State*, 828 S.W.2d 12, 13 (Tex. Cr. App. 1992) (*holding that the remedy for a failure to address a reply to*

point of error on appeal is to vacate and remand the case to the court of appeals to consider the neglected argument) (emphasis added).

See also State v. Cortez, 501 S.W.3d 606 (Tex.Crim.App. 2016) (granting State's petition for discretionary review and remanding because the court of appeals failed to address every issue necessary to the disposition of the case); *Carsner v. State*, 444 S.W.3d 1 (Tex.Crim.App. 2014) (same). As a result, in the alternative to the relief sought in Issue I, Petitioner asks this Court to reverse the court of appeal's judgment, and to remand this cause to the court of appeals so that it can fully consider and address Chambers' arguments regarding the defense embodied within Section 37.10(f).

III. The Court of Appeals Erred by Upholding the Trial Court's Denial of Chambers' Requested Jury Instruction.

A. Standard of Review

The law entitles a defendant, upon request, to instructions on defensive issues raised by the evidence. *Rogers v. State,* 105 S.W.3d 630, 639-40 (Tex.Crim.App. 2003). The requested instruction need only apprise the trial court of the subject of the particular subject matter of the instruction. *Id* at fn. 34. Pursuant to Article 36.19 of the Code of Criminal Procedure, and the Court of Criminal Appeals' decision in *Almanza v. State*, timely objected to errors in the jury charge require reversal of the conviction if the error is calculated to injure the rights of the defendant. *Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim.App. 1985). The trial court's decision not to

submit a requested defensive instruction is reviewed on appeal under an abuse of discretion standard. *Love v. State*, 199 S.W.3d 447, 455 (Tex. App—Houston [1st Dist.] 2006, pet. ref'd).

The courts review alleged jury charge error in two steps: first, they determine whether error exists; if so, they then evaluate whether sufficient harm resulted from the error to require reversal. *Price v. State*, 457 S.W.3d 437, 440 (Tex.Crim.App. 2015); *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex.Crim.App. 2005). The degree of harm required for reversal depends on whether the jury charge error was preserved in the trial court. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (op. on reh'g). If the jury charge error has been properly preserved by an objection or request for instruction, reversal is required if the appellant has suffered "some harm" from the error. *Vega v. State*, 394 S.W.3d 514, 519 (Tex.Crim.App. 2013); *Almanza*, 686 S.W.2d at 171; *see Barrios v. State*, 283 S.W.3d 348, 350 (Tex.Crim.App. 2009) ("If there was error and appellant objected to the error at trial, reversal is required if the error 'is calculated to injure the rights of the defendant,' which we have defined to mean that there is 'some harm.'"). When the error was not objected to, the error must be "fundamental" and requires reversal only if it was "so egregious and created such harm that the defendant was deprived of a fair and impartial trial." *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex.Crim.App. 2015); *Almanza*, 686 S.W.2d at 171.

B. The Failure to Give the Requested Instruction Constitutes Error.

The court of appeals improperly upheld the trial court's denial of Chambers' requested jury instruction. [Opinion 8-11]. Chambers' requested instruction 6 would have informed the jury that under TEX. LOCAL GOV'T CODE § 341.012, the volunteer reserve officers named in each count of the indictment were not subject to TCOLE regulation and therefore, the firearm qualification documents submitted to TCOLE as to each of them failed to fall within the definition of "government record" [as defined by TEX. PENAL CODE § 37.01(2)(A & B)("anything belonging to, received by, or kept by the government for information" or "anything required by law to be kept by others for information of government," as submitted to the jury)]. [CR 172, 175]. By failing to instruct the jury on TEX. LOCAL GOV'T CODE § 341.012, the jury was deprived of the law that would have allowed it to properly determine that Chambers did not violate the tampering statute (i.e., TEX. PENAL CODE §37.10(a)(1) &(c)(1), as alleged in each count of the indictment).

The court of appeals concluded that the trial court did not err by denying Chambers' requested instruction embodying language from § 341.012 "because, to the extent he asserted a defensive theory relating to that statute, it consisted only of negating this element of the State's case," citing *Walters v. State*, 247 S.W.3d 204 at 209 (Tex.Crim.App. 2007). Opinion at 11.

The court of appeals' opinion is simply wrong. While a *non-statutory* defensive instruction that goes no further than to negate an element of the offense, such as alibi, is not required under *Walters*, Chambers' requested instruction was *statutorily based* and went further than negating an element of the offense. Indeed, it was integral to the jury's ability to determine whether the documents satisfied the definition of "governmental record." This necessarily follows because it would have informed the jury of the law by which it properly should have determined whether the documents were or were not "kept by government for information" or "required by law to be kept" (under both prongs of the definition of "government record" submitted to the jury and embodied in § 37.01(2)(A and B, respectively). By so doing, the court of appeals has issued a published opinion inconsistent with *Walters.*

Additionally, the court of appeals opinion also conflicts with this Court's opinion in *Celis v. State*, 416 S.W.3d 419, 432-34 (Tex.Crim.App. 2013). In *Celis*, this Court approved the submission of instruction on a statutorily defined term - "foreign legal consultant" - contained in State Bar Rules in order to assist the jury in ascertaining whether Celis satisfied the defensive issue of whether he was "in good standing with the State Bar" (element under TEX. PENAL CODE § 38.122).

Furthermore, the court of appeals' opinion ignores the long-standing mandate that "[i]t is not the function of a jury charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion." *Williams*

v. State, 547 S.W.2d 18, 20 (Tex.Crim.App. 1977); *Gordon v. State*, 633 S.W.2d 872, 877 (Tex.Crim.App. 1982); *Hutch v. State*, 922 S.W.2d 166, 170 (Tex.Crim.App. 1990); *Vasquez v. State*, 389 S.W.3d 361, 367 n.11 (Tex.Crim.App. 2012). A full explanation of the law contained within § 341.012 was necessary so that the jury could ascertain whether the firearm qualification documents submitted to TCOLE as to each of the fourteen counts fell within the definition of "government record." Only by being instructed on the law embodied within § 341.012 of the Local Government Code could the jury fully, fairly and faithfully discharge its duties.

C. Petitioner Suffered "Some Harm" From the Error

Inasmuch as Petitioner properly preserved his requested instruction, reversal is required if he suffered "some harm" from the error. Such error was certainly not harmless, but rather was calculated to injure the rights of Petitioner. Some error is found when assaying the harm in light of the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence, the argument of counsel, and the record as a whole. *Almanza*, 686 S.W.2d at 171. The error went to the core of Petitioner's defense – that the volunteer reserve officers named in each count of the indictment were not subject to TCOLE regulation and therefore, the firearm qualification documents submitted to TCOLE as to each of them failed to fall within the definition of "government record". Therefore, reversal is called for in this case.

The trial turned on the question of whether or not the firearms qualification documents submitted to TCOLE were, in fact, governmental records. Although the State's witness, Agent Minor, claimed that these documents were required by law to be kept, his testimony also established that the law allowed for a chief of police to appoint a volunteer reservist even if that individual was not subject to TCOLE supervision, i.e. not a licensed peace officer. [RR Vol. 10 at 93-94]. The testimony also established that each of the fourteen officers listed in the indictment was a volunteer reserve officer.[6] Under these circumstances, no rational trier of fact could have found John Chambers guilty beyond a reasonable doubt had they been instructed on Section 341.012 of the Texas Local Government Code, which establishes that the qualifications for reserve officers are set by the municipality and the chief, not TCOLE. To this end, Petitioner sought a jury instruction charging the jury on the law applicable to volunteer reservists under Section 341.012 of the Local Government Code. [CR at 172]. The trial court denied the requested instruction. RR Vol. 12 at 121-123]. Because the testimony established that these officers were volunteer reserves, and the law relieves the Chief of any TCOLE record keeping requirements for such officers, some harm occurred by denying the requested instruction.

[6] [RR Vol 11 at 95; 101; 113; 121; 130; 135; 140; 148; 154; 158; 164; 170-72; 179; 232].

It is an essential element of the offense of tampering with a governmental record that the item tampered with *is* a governmental record. The jury was unable to rationally decide this question because it was denied an instruction on the law applicable to whether this firearms qualification data was required by law to be kept. Although Petitioner was able to produce evidence in support of his defensive theory, his defense was incurably hamstrung by the inability to present the applicable law to the jury. Had the jury been properly instructed on Section 341.012 of the Texas Local Government Code, it is beyond question that John Chambers would not have been convicted.

As a result, in the alternative to the relief sought in Issue I, Petitioner asks this Court to reverse his conviction on each of the fourteen counts, and to remand this cause for a new trial so that the jury can properly be instructed on the applicable law governing the question of whether these records were required by law to be kept.

IV. The Court of Appeals Erred in Its Analysis of The Intent to Defraud Enhancement

The difference between the class a misdemeanor and the felony enhancement is a distinction without a difference. *See* TEX. PENAL CODE § 37.10(c)(1). In addition, the appellate court's analysis of the "intent to defraud" enhancement contained in TEXAS PENAL CODE § 37.10(c)(1) depended upon the ability of TCOLE to enforce a violation of its auditing procedures. *See* Opinion at 12-13. The problem

once again flows back to the appellate court's refusal to analyze whether TCOLE was, as a matter of law, able to regulate reserve officers in the first place. If TCOLE was regulating what it could not according to the law, then how could it take action against Chambers or his department? Thus, the problems urged by Chambers on appeal remain.

There was nothing in the trial that could support a finding that Chambers made the false entries with the intent to defraud the State of Texas as charged. Due to the legal impossibility of enforcement as a matter of law, the totality of the evidence is legally insufficient to support a conviction. *Lawhorn*, 898 S.W.2d at 891. This is so even if the evidence showed Chambers mistakenly believed he could be reprimanded by TCOLE. *DeLay*, 443 S.W.3d at 912 (Tex.Crim.App. 2014) (citing *Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007) (facts establish what State alleges but still does not constitute a crime). This court should thus reverse the convictions on all fourteen counts and render a judgment of acquittal as to the felonies.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, John Chambers, Petitioner, respectfully prays for this Court to REVERSE the judgment and render an ACQUITTAL for Petitioner. Alternatively, Petitioner respectfully prays for this Court to REVERSE the judgment and REMAND the case for further proceedings as requested herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 6,568 words in the portions of the document that are subject to the word limits of Rule 9.4(i) of the Texas Rules of Appellate Procedure, as measured by counsel's word-processing software.

/s/ Chad P. Van Brunt
Chad P. Van Brunt

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review was emailed to Luis V. Saenz at luisv.saenz@yahoo.com and to Samuel Katz at samuel.katz@co.cameron.tx.us

/s/ Chad P. Van Brunt
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